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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DAVID CANTARELLA and RUTH HERRERA.	
DAVID CANTARELLA, Appellant, v. RUTH HERRERA, Respondent.	G054843, G054900 (Super. Ct. No. 06D006157) O P I N I O N

Appeals from postjudgment orders of the Superior Court of Orange County, Claudia Silbar, Judge. Affirmed.

David Cantarella, in pro. per., for Appellant.

Ruth Herrera, in pro. per., for Respondent.

* * *

Appellant David Cantarella (father), a vexatious litigant, appeals from orders where the court first granted respondent Ruth Herrera (mother)[1] educational custody and then granted her full custody of the parties' child (child). He claims several errors: 1) the court heard a matter ex parte when there was no emergency; 2) the order on mediation was erroneous; 3) the court failed to rule on father's request to change child's school, and the grant of sole custody of child's education rights to mother was improper; 4) father's request for a continuance of a hearing should have been granted; 5) the court failed to rule on his written evidentiary objections; 6) the court denied his motion to compel discovery; 7) the vexatious litigant statute is unfair and unconstitutional vis-à-vis the best interest of child; 8) granting mother sole custody as to child's medical rights was improper; 9) imposition of monitored visitation at a monthly cost of $1,600 was cruel and unusual punishment; and 10) the judge was biased and a new judge should be assigned on remand.

We find no error and affirm.

RULES VIOLATIONS AND DEFECTS IN FATHER'S BRIEF

Father's summary of facts was wholly inadequate, in violation of California Rules of Court (all further references to rules are to the California Rules of Court). Father failed to "[p]rovide a summary of the significant facts" as required by rule 8.204(a)(2)(C). Instead his brief summary of facts failed to include information necessary to understand his claims, and the facts that were included were a one-sided version in his favor. Because on several issues father argues insufficiency of the evidence he was required to "'summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient. . . . He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent

[1] Orange County Department of Child Support Services is a party to the underlying action. It did not file a brief because it lacked standing; the issues presented pertain solely to child custody.

examination of the record when appellant has shirked his responsibility in this respect.'" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409, italics omitted.)

Father also included arguments in his statement of the case that he did not include in the argument section, making our review more difficult.

Additionally, father failed to provide a sufficient record of the proceedings in the family court in violation of rules 8.120, 8.122, and 8.124. A number of the documents necessary to understand the appeal were not included in the record as noted below. These include several minute orders provided in the respondent's appendix.

Failure to comply with the court rules is a ground for forfeiture of claims. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 53.) The fact father is appearing in propria persona makes no difference. A self-represented litigant is not entitled to "special treatment" (*Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 524) but is held to the same standards as a party represented by counsel (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247 [the appellant's issues forfeited due to defects in opening brief]).

To the extent they are relevant, or we are able, we will attempt to address father's claims on the merits. Otherwise the claims are forfeited for the reasons set forth above or as explained in our discussion of the issue. Further, we may inadvertently overlook an argument buried in the statement of the case. (*Provost v. Regents of University of California, supra*, 201 Cal.App.4th at pp. 1294-1295.) ["we do not consider all of the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument"].)

FACTS AND PROCEDURAL HISTORY

Child is almost 13 years old. The original dissolution action as filed in 2006 and the parties have regularly been before the trial court since that time.[2]

[2] This is the first of two appeals being decided, the other being *(In re Marriage of Cantarella and Herrera* (Mar. 29, 2019, G055857, G056098) [nonpub.opn.]).

When the instant dispute arose parents had joint legal and physical custody of child, with child living at their respective residences every other week. Mother lived in Corona and worked in Santa Ana; father lived in Costa Mesa. Child had been attending school in Yorba Linda since 2013.

In July 2016, the school district notified parents it was not approving their request for an interdistrict transfer for the upcoming school year based on parents' "ongoing and repeated uncivil behavior towards District personnel." Father filed a request for order (RFO) seeking to have child attend school in Costa Mesa (Change of School RFO). The hearing was set for September 29, 2016.

On September 2, 2016 mother filed an RFO to change custody and visitation (Custody & Visitation RFO), seeking to have it heard ex parte. The court declined to decide the matter ex parte and set it, on an order shortening time, for hearing also on September 29. The court ordered the parties to meet and confer about selecting a private school prior to the next hearing.

After the hearing in the findings and order, the court noted it had had the case since shortly after it was filed and had "a lot of historical knowledge."[3] In ruling on the two RFO's it considered the entire record, prior hearings, prior evidence and findings, testimony of the parties and witnesses, exhibits, and the court's familiarity with the matter. It also noted child was 10 years old and should have been attending school beginning 30 to 60 days earlier. It was not in his best interest to miss school for even one more day. Child has educational challenges.

The court awarded sole legal custody for education purposes to mother, including the right to choose his school, and ordered he be enrolled forthwith. Mother was required to update father weekly on all information concerning child's schooling.

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[3] At the hearing the court noted it had six to seven years of experience with the matter.

The hearing on the remaining issues from the Custody and Visitation RFO, i.e., sole legal custody for medical purposes and primary custody by mother with visitation for father, was continued to January 12, 2017. No changes were made at a subsequent hearing. The court did advise father that if he failed to cooperate on child's medical or psychological problems, he would lose his medical custody rights, just as he had lost educational custody rights. Several times father represented to the court he would cooperate with mother and they were making progress with their relationship. The court set a review hearing for May.

On March 2, mother filed another RFO re custody and visitation (Second Custody & Visitation RFO) and sought emergency orders. This was filed because as of January 29, when father picked up child, he had kept him out of school for a total of 18 days and did not allow mother access to child during her week for visitation. Mother asked for sole legal and physical custody. The court issued temporary orders, giving mother sole custody and no visitation for father until the next hearing. The order provided mother could seek law enforcement assistance to retrieve child.

Mother filed a second ex parte RFO (Ex Parte RFO) on March 10, claiming father had violated the March 2 order by not releasing child to mother's custody. She requested that an arrest warrant for father be issued and an order that the Orange County Child Abduction Unit could assist her in obtaining custody of child. She also sought a temporary emergency order barring father's visitation.

In her declaration in support of the Ex Parte RFO mother stated that after the March 2 order awarding her sole custody, when she went to father's residence, with police present, to pick up child, father would not allow police into the residence and instead told police child thought mother was going to kill him. Two additional times mother attempted to pick up child, once at father's residence and another time at child's school. Both times child refused to go with mother. The child told school personnel mother was trying to kidnap him.

At the ex parte hearing on March 10, the court ordered that child was to go home with mother that day with no visitation for father. Mother was to pick child up at school. When father's lawyer explained father kept child because child had told him he was afraid of mother, the court, again noting its lengthy history with the case, observed father had said such things in the past. And father knew that if there was a problem he needed to file a motion or call the police. Based on her six years of handling the case, the court did not find father's allegations credible but ordered an emergency investigation of the claims to determine whether there was an "imminent risk of emergency."

At the March 15, 2017 hearing the investigator testified child was not in danger in either parent's house. Child had told him, "My dad gets in my head sometimes and makes me say things. He just makes me say lies about my mom." Child said father told him to "say bad things about" mother "thousands of times." Child also stated father told him to tell police and teachers he was afraid of mother but it was a lie. The investigator testified he was concerned for child's emotional wellbeing if father's behavior continued. The investigator also testified that father's failure to return child to mother for six to eight weeks was a "serious concern" and safety issue. There were also serious problems with child being with father if father continued to make negative comments to child about mother.

In making its ruling the court found that father kept child out of school so mother would not be able to pick him up. The court noted there was "absolutely" no basis for father to withhold the child from mother based on safety concerns. The court disagreed with the investigator's opinion there were no safety issues when child was in father's custody. When father told the court child had told him he was afraid mother was trying to kill him, the court told father it believed he was lying "again."

The court found it was not in child's best interest for father to keep him out of school and away from mother and there was a risk it would happen again unless father "learn[ed] something." The court awarded mother sole legal custody with monitored

visitation to father. The court selected the monitor, an investigator from the district attorney's office. The court stated it would consider ordering nonmonitored visitation when father could provide proof from "a well-qualified therapist that [father] understands coparenting" and understands how his conduct over the past several years was not in "child's best interests."

Additional facts are set out in the discussion.

DISCUSSION

1. Ex Parte Hearing

When mother filed her ex parte Custody and Visitation RFO, the court refused to hear it ex parte and instead set it for a hearing 27 days later on an order shortening time, stating there was no emergency. Father claims the court did hear it ex parte. This is incorrect. Although unclear, it may be that father is arguing the hearing should not have been set on shortened notice because he did not have time to do discovery.

Other than setting out the California Rules of Court governing ex parte applications in family law matters, father includes no authority or reasoned legal argument supporting his claim. This forfeits the argument. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*) [issue forfeited for failure to provide authority or reasoned legal argument].)

2. Mediation Order

On September 2, 2016 in completing the order denying the ex parte and setting the Custody and Visitation RFO for hearing, the court checked a box stating, "The parties must attend an appointment for child custody mediation of child custody recommending counseling as follows." There is a handwritten notation "Attended on 8-31-16." Included in the record is a notice by a court mediator that the parties met on August 31 and were unable to reach an agreement.

Father claims the court erred by failing to order mediation prior to the hearing on the Custody and Visitation RFO. He confusingly argues the court did not read his RFO to change child's school and the mediation that took place had nothing to do with custody but was solely about the change of school. In his "Statement of the Case" father also questions how the parties could have mediated a matter that did not exist until after the mediation. This claim fails.

First, nothing in the record shows what was discussed during the August mediation. Second, father did not cite any authority requiring there be mediation before a hearing on custody and visitation. The court was aware there had been a mediation and was obviously satisfied it sufficed. Equal protection and due process are not implicated by this argument.

Father also argues the court erred by failing to rule on his objection to the "order." He refers to his request to strike portions of mother's declaration filed in support of her Custody and Visitation RFO. His objection stated: "Defected [*sic*] Complaint, Vagueness, Overbreath, Court Order, Violation of Equal protection laws [*sic*], Lack of Foundation; Argument." The objection was insufficient. It is not at all clear to what order it refers nor is there a sufficient explanation of the substance of his objection.

Finally, father has not shown he was prejudiced by his claimed error. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108 [no reversal absent prejudicial error].)

3. Hearing on Father's Change of School RFO Grant of Educational Rights to Mother

Father contends the court failed to consider the Change of School RFO. In a related argument he asserts the court erred by awarding sole educational rights to mother. These claims have no merit.

First, without citation to the record, father maintains the court stated it would not hear his Change of School RFO and abused its discretion by excluding his exhibits. The minute order from the hearing on the RFO's, which father improperly failed to include in his appellant's appendix, is to the contrary.

The court stated it would not select child's school, but would choose the parent best suited to have sole educational custody. It then proceeded to allow father to put on his evidence and introduce exhibits.

Father also argues there was no evidence to support the order because child had progressed in math and language for the past year and no longer needed to be enrolled in the resource specialist program. Aside from the fact child was not meeting grade level standards in certain subjects, his progress in school has nothing to do with resolving the issue presented to the court. Child had missed the first 30 to 60 days of the school year. The school he had been attending refused to allow him to continue because of conflicts with parents.

The court, having dealt with these parties on many issues over many years, made a lengthy record explaining why father should not have education custody. It pointed out the tone of father's communications with child's teachers, principals, and counselors was "confrontational, abusive, verbally abusive, and intimidating" and that he "cause[d] all of these problems." His letters to "too many different people" connected to child's schooling were "uncivil." The court randomly selected letters father had sent over the many years to various school officials and read his "uncivil" comments. The court noted father complained about "every single person that has walked across [child's] path." The court concluded that if father was allowed to choose the school, "you'll be in disagreement with that school in no time at all, because that is what happens everywhere he goes."

This was more than sufficient evidence to support the court's ruling.

4. Denial of Continuance

Three days before the hearing on the first two RFO's, father filed a request for a 60-day continuance, claiming he had not had time to propound discovery or prepare for the hearing. The court denied the motion, explaining: the 10-year-old child should have begun attending school at least 30 to 60 days earlier. The court found it was not in

child's best interests and would be detrimental to have child miss any more school. Any further delay would cause child to fall farther behind and could harm his emotional well-being.

Father claims the court abused its discretion by denying his request for continuance. "A motion for continuance is addressed to the sound discretion of the trial court. [Citation.]" (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.) The record reflects the court had a valid reason for denying the request, i.e., the well-being of the child, contrary to father's claim the court gave no legal reason. Father has not shown this was an abuse of discretion.

Again, neither due process nor equal protection is relevant to this issue.

5. Failure to Rule on Father's Objections

Father filed a request to strike parts of mother's declaration in opposition to the Change of School RFO and to her declaration in support of the Custody and Visitation RFO. He claims the court erred by failing to rule on any of them. But the court advised during the hearing it was not relying on any declarations but would only be considering testimony. Thus, there was no need to rule on any objections and the court did not err.

6. Denial of Father's Motion to Compel Discovery

In September 2016 father filed a memorandum of points and authorities in support of a motion to compel mother's responses to form interrogatories and requests for admission. The record does not contain an actual motion, and the only declaration filed was by father, who is not an attorney. It was just over one page where he set out that no responses were filed and his hourly rate was $200. In denying the motion, the court stated there was no motion before the court. Therefore it could not rule on it. The court advised father he had not "file[d] the proper discovery motion."

The court was correct. A memorandum of points and authorities alone is not a sufficient motion to compel discovery a notice of motion and motion are required.

(Rule 3.112(a), (d).) There was no abuse of discretion nor violation of father's 14th Amendment rights.

7. Vexatious Litigant Statute

Father contends the vexatious litigant statute (Code Civ. Proc., § 391) is unconstitutional as applied and unfair vis-à-vis the best interests of child. He maintains child was injured by reason of father's being declared a vexatious litigant. This argument fails.

Father cites to a December 2015 request he made to file a new RFO as required of a vexatious litigant. It stated mother had refused to provide child's medical and educational information to him. The court denied the request in May 2016. Father complains child's best interest was not served by the delay in responding to and the denial of the request.

But this request was filed seven months before the school district refused to allow child to continue attending. And the request does not identify the substance of the proposed RFO. Further there is no authority cited. This argument is forfeited for failure to properly present it. (*Benach, supra,* 149 Cal.App.4th at p. 852.)

8. Award of Medical Custody Rights to Mother

Father claims the court erred in awarding sole medical custody to mother. But father fails to direct us to any order to that effect. Rather, the record reflects the court did not award mother sole medical custody.

Father makes several arguments wholly unrelated to medical custody, some of which are duplicates of claims we have resolved in other sections, such as discovery claims, his motion to strike, and judicial bias. We do not address them here a second time.

Father also appears to challenge the court's order taking the review hearing off calendar when it awarded mother sole legal custody. He mischaracterizes the review hearing as a trial where he was going to offer evidence about mother's failure to

cooperate regarding medical issues. But the record does not support this claim. Instead, the hearing was to review whether father was cooperating with mother's requests for medical treatment for child, whether child was being tutored weekly, to review a letter from a counselor and the most recent individual education program report, whether parents had met with child to tell him they would be working together, obtaining a passport for child, and a Christmas vacation schedule. Once sole custody was awarded to mother, there was no need for a review hearing. There is no Fourteenth Amendment issue here.

9. Cost of Father's Monitored Visits

When the court granted sole legal custody of child to mother, it ordered father would have two visits a week for up to two hours per visit, monitored with a designated monitor. Father was ordered to pay the monitor. No amount was specified. Father did not object to any part of that order.

Father asserts the cost of the monitor is $1,600 per month and claims this was cruel and unusual punishment in violation of the Eighth Amendment because the court knew he is "a low income person." This argument is without merit.

The court had discretion to order father to pay for the monitor (see *In re Chantal S.* (1996) 13 Cal.4th 196, 206 [court may order payment in dependency case]), and it was not a punishment. Thus, the Eighth Amendment, prohibiting cruel and unusual punishment, does not apply.

In addition, father points to no evidence in the record showing the cost of the monitor or that he lacks the ability to pay. His conclusory arguments are insufficient. Further, father did not object when the court made the order and thus the issue is forfeited. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 [to preserve issue for appeal party must object in trial court].)

Father also asserts this was error because the social services investigator appointed by the court testified child was not afraid of father. This argument does not persuade.

Alleged fear of father was not the basis for the order. The record is clear the court ordered monitored visitation because father had withheld child from mother for six to seven weeks, requiring law enforcement to assist mother to take custody, and kept child out of school for 18 days. The court did not want to risk this happening again. The court did not abuse its discretion.

10. Judicial Bias

For several of the arguments raised father maintains the trial judge was biased and should be recused. He makes the unsupported conclusion the court ruled in mother's favor because of her gender. He also claims the trial judge made "up stories without any evidence or testimony from witnesses." Further, he seems to argue it was improper for the judge to ask a coworker of the former special master in the case to say hello.

There is no evidence to support these claims. It is not improper for a judge to say hello to a lawyer. Further, the fact a judge makes unfavorable rulings does not demonstrate bias.

"When making a ruling, a judge interprets the evidence, weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses determinations in favor of and against parties. How could it be otherwise? We will not hold that every statement a judgment makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias." (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219.) "'[W]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him [or her] in the trial of the action. It

is his [or her] duty to consider and pass upon the evidence produced before him [or her], and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party. The opinion thus formed, being the result of a judicial hearing, does not amount to [improper] bias and prejudice . . . .' [Citation.]" (*Id*. at pp. 1219-1220.)

Additionally, even a judge's erroneous rulings against a party do not constitute judicial bias. (*People v. Avila* (2009) 46 Cal.4th 680, 696.)

We have the authority to direct the case be assigned to a different judge in the interests of justice. (Code Civ. Proc., § 170.1, subd. (c).) However this power "should be 'used sparingly.'" (*In re Marriage of Walker* (2012) 203 Cal.App.4th 137, 153.) None of the actions cited by father shows bias. Nothing in the record suggests the judge will be anything but fair. In fact, the record reflects the judge has been more than fair, giving father multiple chances to act in child's best interest. The interests of justice would not be served by reassigning the case.

DISPOSTION

The postjudgment orders are affirmed. Mother is entitled to costs on appeal if any were incurred.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.